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GH-USA VALVE CO

v.

TECHNO RADA SDN BHD

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HIGH COURT SABAH & SARAWAK, MIRI
STEPHEN CHUNG JC
[SUIT NO: MR-22-5-2011]
6 JANUARY 2012

C ***CIVIL PROCEDURE:*** *Costs - Security for costs - Application for - Plaintiff company incorporated in USA - Whether plaintiff a foreign company and had no asset within jurisdiction - Whether claim within guideline and not oppressive - Compagnie Generale Des Eaux v. Compagnie Generale Des Eaux Sdn Bhd*

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The plaintiff, a company incorporated in the United States of America (USA) with a place of business in Subang Jaya, Malaysia, claimed against the defendant for a sum of US$261,502.33 (RM798,366.61). The defendant denied the plaintiff's claim and filed a counterclaim for breach of contract. This was the E defendant's application that the plaintiff furnish and pay a sum of RM50,000 as security for costs within fourteen days of the court order, in the event that the defendant's application is allowed. The defendant submitted that the plaintiff was a foreign company and had no asset within the jurisdiction, thus there was a real risk of F the defendant not obtaining any costs from the plaintiff in the event the plaintiff's claim against the defendant is dismissed.

Held (allowing defendant's application):

G **(1)** The onus of proving that the plaintiff was ordinarily resident outside the jurisdiction was on the defendant. A company not registered in Malaysia is considered not to be within the jurisdiction: *Compagnie Generale Des Eaux v. Compagnie Generale Des Eaux Sdn Bhd*. Herein, the plaintiff is a company H incorporated in the USA. The USA is not one of the reciprocating countries listed in the First Schedule of the Reciprocal Enforcement of Judgment Act 1958. In the event the defendant is successful in this action, it would be difficult to enforce the order of cost against the plaintiff. The plaintiff's I claim against the defendant was for RM798,366,61. The

application for security for costs of RM50,000 was less than 10% of the claim, and was within the 25% guideline and was not oppressive. (paras 5 & 8)

Case(s) referred to:

Air Marketing Asia Pacific Pty Ltd v. Damai Puri Resort & Spa Sdn Bhd [2011] 1 LNS 159 HC ***(refd)***

Compagnie Generale Des Eaux v. Compagnie Generale Des Eaux Sdn Bhd [1992] 4 CLJ 1979; [1992] 2 CLJ (Rep) 311 HC ***(refd)***

Gateway Land Pte Ltd v. Turner (East Asia) Pte Ltd [1988] 2 CLJ 364; [1988] 2 CLJ (Rep) 732 HC ***(refd)***

Kasturi Palm Products v. Palmex Industries Sdn Bhd [1985] 1 LNS 149 HC ***(refd)***

Quality Tractors (M) Sdn Bhd v. United Asian Bank Bhd [1979] 1 LNS 84 HC ***(refd)***

Porzelack KG v. Porzelack (UK) Ltd [1987] 1 All ER 1074 ***(refd)***

Raju Rajaram Pillai v. MMC Power Sdn Bhd & Anor [2000] 4 CLJ 189 HC ***(refd)***

S & S Power Switchgear Ltd v. Toprank Corp Sdn Bhd [2005] 6 CLJ 304 HC ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 23 r. 1(1)

For the plaintiff - Patrick Liaw; M/s Jimmy HT Wee & Co
For the defendant - Gabriel Kok; M/s Khoo & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Stephen Chung JC:

[1] The plaintiff is a company incorporated in the United States of America (USA) with a place of business in Subang Jaya, Selangor, Malaysia. The plaintiff's claim against the defendant is for a sum of US$261,502.33, which was converted to RM798,366.61 as at 28 February 2011, being the balance of the price of goods sold and delivered including freight charges and excess valves delivered but not returned by the defendant. The defendant denied the plaintiff's claim and has filed a counterclaim for breach of contract against the plaintiff *inter alia* for not supplying valves as per the technical specifications provided by Malaysia LNG Dua Sdn Bhd.

[2] This is the defendant's application that the plaintiff shall furnish and pay a sum of RM50,000 as security for costs within 14 days of the court order, in the event that the defendant's application is allowed. Order 23 r. 1(1) RHC provides that where, on the application of a defendant to an action or other proceeding in the High Court, it appears to the court (a) that the plaintiff is ordinarily resident out of the jurisdiction; (b) that the plaintiff (not being a plaintiff who is suing in a representative capacity) is a nominal plaintiff who is suing for the benefit of some other person and that there is reason to believe that he will be unable to pay the costs of the defendant if ordered to do so; (c) subject to para. (2), that the plaintiff's address is not stated in the writ or other originating process or is incorrectly stated therein; (d) that the plaintiff has changed his address during the course of the proceedings with a view to evading the consequences of the litigation, then, if, having regard to all the circumstances of the case, the court thinks it just to do so, it may order the plaintiff to give such security for the defendant's cost of the action.

[3] The grounds of the defendant's application are that the plaintiff is a foreign company and normally resident in the USA, outside the jurisdiction of the court and there is no other co-plaintiff who is resident within the jurisdiction. It was submitted that the plaintiff has no asset within the jurisdiction and there is a real risk of the defendant not obtaining any costs from the plaintiff in the event the plaintiff's claim against the defendant is dismissed with costs. It was also submitted that the plaintiff's address was intentionally wrongly stated in the writ and its pleadings.

[4] The affidavit in support of the defendant's application stated that a director of the defendant has checked with the Companies Commission of Malaysia and the Malaysia International Development Authority and they have no record of the plaintiff being registered with them as a foreign company in Malaysia. This director has also said that on 31 March 2011 he had gone to the plaintiff's given address at Subang Jaya and he found that the plaintiff did not have an office at the given address. The plaintiff has replied in its affidavit that the given address is its representative office and has exhibited its correspondence with the defendant which used or referred to the given address to show that the defendant was aware of this fact and there was never any intention to deceive.

[5] In such an application, the onus of proving that the plaintiff is ordinarily resident outside the jurisdiction is on the defendant. It is a question of fact and degree. A company not registered in Malaysia is considered not to be within the jurisdiction: *Compagnie Generale Des Eaux v. Compagnie Generale Des Eaux Sdn Bhd* [1992] 4 CLJ 1979; [1992] 2 CLJ (Rep) 311. In this case, it is not in dispute that the plaintiff is a company incorporated in the USA. It has a representative office at Subang Jaya.

[6] The security for costs cannot be ordered as of right from a foreign company. The court has a discretion whether to order security for the defendant's costs. The court will have to consider whether it is just to do so: *Kasturi Palm Products v. Palmex Industries Sdn Bhd* [1985] 1 LNS 149, *S & S Power Switchgear Ltd v. Toprank Corporation Sdn Bhd* [2005] 6 CLJ 304 or whether it would be oppressive to the plaintiff: *Gateway Land Pte Ltd v. Turner (East Asia) Pte Ltd* [1988] 2 CLJ 364; [1988] 2 CLJ (Rep) 732, *Quality Tractors (M) Sdn. Bhd. v. United Asian Bank Bhd* [1979] 1 LNS 84.

[7] There are several factors that the court has to consider, one of which is the likelihood of the plaintiff's success in the action. However, it has been held that the merits of the case ought not to be discussed at this stage of the proceedings unless it can be clearly shown that the plaintiff's case has no merits or is a sham or an abuse of the process of the court. Another factor is the plaintiff's or the defendant's rights of enforcement of the judgment under the law or any treaty: *Porzelack KG v. Porzelack (UK) Ltd* [1987] 1 All ER 1074. The USA is not one of the reciprocating countries listed in the First Schedule of the Reciprocal Enforcement of Judgment Act 1958. In the event the defendant is successful in this action, it will be difficult to enforce the order of cost against the plaintiff.

[8] The plaintiff's claim against the defendant is for RM798,366.61. The application for security for costs of RM50,000 is less than 10% of the claim, is within the 25% guideline and is not oppressive: *Raju Rajaram Pillai v. MMC Power Sdn. Bhd. & Anor* [2000] 4 CLJ 189, *Air Marketing Asia Pacific Pty Ltd v. Damai Puri Resort & Spa Sdn. Bhd.* [2011] 1 LNS 159.

A **[9]** The defendant's application is allowed. The plaintiff is to pay the sum of RM50,000 into court within 60 days from today which is to be kept in an interest-bearing fixed deposit account. Costs of RM500 to the defendant for this application.

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